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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 569

JOY SILK MILLS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

HENRY J. FOX,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdictional statement	1
Questions presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	9
I. The Board's Order Is Not Supported By Substantial Evidence On the Record Considered As A Whole	9
II. Counsel's Prehearing Inquiries Submitted To Employees In Preparing Petitioner's Defense To Allegations Of Unfair Labor Practices Did Not Violate Section 8(a)(1) of The Act	10
A. Inquiries By Counsel Submitted To Employees Which Are Not In Fact Coercive Are Not Violations Of Section 8(a)(1) Of The Act	11
B. The Decision Of The Court Below that Counsel's Prehearing Inquiries Which Did Not Elicit Information Of Sufficient Probative Value Violated Section 8(a)(1) Of The Act Imposes An Undue Burden Upon Counsel	12
Conclusion	13

CITATIONS

Cases:

Budd, Edward G., Manufacturing Co. v. *National Labor Relations Board*, 142 F. 2d 922, 926 (3rd Cir. 1944)	12
National Labor Relations Board v. *Brown-Brockmeyer Co.*, 143 F. 2d 537, 543 (6th Cir. 1944)	11
National Labor Relations Board v. *Caroline Mills, Inc.*, 158 F. 2d 793, 794 (5th Cir. 1946)	12

Page

National Labor Relations Board v. *East Texas Motor Freight Lines*, 140 F. 2d 404, 405 (5th Cir. 1944) 11

National Labor Relations Board v. *Enid Cooperative Creamery Association*, 169 F. 2d 986, 988 (10th Cir. 1948) 12

National Labor Relations Board v. *Grower-Shipper Vegetable Association*, 122 F. 2d 368, 377 (9th Cir. 1941) 11

National Labor Relations Board v. *Pittsburgh Steamship Company* No. 42 9

National Labor Relations Board v. *Trojan Powder Company*, 135 F. 2d 337, 338 (3rd Cir. 1943) 13

National Labor Relations Board v. *Virginia Electric & Power Company*, 314 U. S. 469, 479 (1941) 12

Sax v. *National Labor Relations Board*, 171 F. 2d 769, 772 (7th Cir. 1948) 11

Universal Camera Corporation v. *National Labor Relations Board*, No. 40 9

Statute:

National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136) 29 U.S.C., 151 et seq.:

Section 2 (6) 3
Section 2 (7) 3
Section 7 3
Section 8(a)(1) 3, 6, 7, 10
Section 8(a)(5) 3
Section 10(c) 2
Section 10(e) 3

Miscellaneous:

Canon 39 of the Canons of Ethics of the American Bar Association 12

House Conference Report, No. 510, on H.R. 3020, pp. 53-55 11

SUPREME COURT OF THE UNITED STATES

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Joy Silk Mills, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on December 15, 1950.

Opinions Below

The Decision and Order of the National Labor Relations Board (R. 9) are reported in 85 N. L. R. B. 1263. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 168) is reported in 185 F. 2d 732 (D. C. Cir. 1950).

Jurisdiction

The decree of the United States Court of Appeals for the District of Columbia Circuit was entered on December 15, 1950 (R. 186). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1), and under Section 10(e) of the National Labor Relations Act, as amended.

Questions Presented

1. Whether the 1947 amendments to the National Labor Relations Act have enlarged the scope of judicial review of orders issued by the National Labor Relations Board.
2. Whether the order of the National Labor Relations Board is supported by substantial evidence on the record considered as a whole.
3. Whether inquiries submitted to employees by counsel in preparation of Petitioner's defense to allegations of unfair labor practices were *per se* coercive.
4. Whether inquiries submitted to employees by counsel in preparation of Petitioner's defense to allegations of unfair labor practices violated Section 8(a)(1) of the National Labor Relations Act merely because the answers were not of "sufficient probative value."

Statute Involved

The National Labor Relations Act, Act of July 5, 1935, c. 372, Section 1, 49 Stat. 449, 29 U. S. C. Section 151 *et seq.* as amended by the Labor Management Relations Act, Act of June 23, 1947, c. 120, Title I, Section 101, 61 Stat. 136, 29 U. S. C. Section 151 *et seq.* The pertinent provisions of the National Labor Relations Act, hereinafter called the Act, follow:

Section 10(c) provides in part:

> * * *. If upon the preponderance of testimony taken the Board shall not be of the opinion that the

person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *.

Section 10(e) provides in part:

* * *. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *.

Section 8(a)(1) provides:

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Section 8(a)(5) provides:

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Statement

Petitioner is a South Carolina corporation with its principal office and place of business at Hartsville, South Carolina. It is engaged in the business of twisting, throwing and other processing of its customers' yarns and thread upon a commission basis (R. 153). The union involved herein is the United Textile Workers of America, affiliated with the American Federation of Labor, hereafter called the Union (R. 153).

On February 24, 1949, the General Counsel of the National Labor Relations Board issued a complaint against Petitioner alleging that it had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Sections 2(6), 2(7), 7, 8(a)(1) and 8(a)(5) of the Act (R. 4).

Pursuant to notice a hearing was held in Hartsville, South Carolina on March 22 through March 25, 1949. On

May 27, 1949, the Trial Examiner issued his Intermediate Report and Recommended Order. Thereafter, Petitioner filed exceptions thereto and a brief in support thereof with the National Labor Relations Board, hereinafter called the Board. On September 13, 1949, the Board issued its Decision and Order requiring Petitioner to cease and desist from certain activities and to take certain affirmative action (R. 9).

On October 28, 1949, Petitioner filed a petition for review of, and to set aside, the Decision and Order of the Board, in the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals, one judge dissenting, affirmed the Board's decision, but modified the order (R. 71).

The Board's decision, which was affirmed by the court below, was based upon the facts which are hereinafter summarized.

In the summer of 1948 Petitioner employed a new plant superintendent in an effort to improve the quality and efficiency of its employees' work. As a result the employees were concerned because they believed that he would replace Zim Byrd, a popular foreman. This concern resulted in spontaneous concerted activity among the employees on the morning of September 15, 1948, when a group of employees requested S. C. Gilbert, Petitioner's president, to reassure them concerning Byrd's status. When Gilbert declined to accede to their request, a substantial number of employees signed union authorization cards later that evening and the following morning (R. 154). Thereafter, the employees with few exceptions, failed to report for work until September 20, 1948 (R. 155). During the walkout Petitioner's officials had two conferences with leaders of the walkout. These discussions primarily concerned the employees' demands with respect to Zim Byrd, and also with respect

to paid vacations (R. 154). At no time during the foregoing conferences were any references made to the Union or to union activity, nor was Petitioner aware that a majority of its employees had signed union authorization cards (R. 23).

On September 24, 1948, Gilbert received a long-distance telephone call from Joseph Jacobs, a union official. At the hearing, there was a sharp conflict in testimony as to whether Jacobs informed Gilbert during that conversation that the Union represented a majority of Petitioner's employees and whether Jacobs requested Petitioner to bargain collectively (R. 156). Later that day, a Field Examiner of the Board advised Gilbert by telephone that the Union had filed a representation petition with the Board. He asked Gilbert if he would agree to a consent election. Gilbert informed the Field Examiner that he wished to consult his attorney before arriving at a decision (R. 25).

Less than one week later, September 30, 1948, a meeting of representatives of the Petitioner, the Union and the Board was held at Petitioner's plant for the purpose of arranging a consent election. The meeting was conducted in an atmosphere of complete cooperation, as evidenced by an official account of the proceedings of the Board's Field Examiner who attended the meeting (R. 83). Tentative arrangements for a consent election to be held on October 19, 1948 were completed at this conference (R. 155).

On October 7, 1948, Petitioner posted a declaration of policy on the employees' bulletin board advising the employees of their right to vote either for or against the Union without regard to Petitioner's views on the subject. On October 12 and October 18, 1948, Petitioner read prepared statements to the employees, advising them among other things of their rights under the Act and their freedom to exercise those rights regardless of Petitioner's views. On

October 19, 1948, the election was held as scheduled and the Union was defeated by a substantial majority.

At the hearing, there were numerous sharp differences between testimony of Petitioner's witnesses and those of the Board's General Counsel with respect to alleged statements and actions of Petitioner's plant superintendent and bookkeeper which occurred on October 19, 1948, the day of the election and the preceding day (R. 43, 47). Both the Trial Examiner and the Board resolved most of these conflicts against Petitioner's witnesses and found that the plant superintendent and bookkeeper, engaged in conduct which violated Section 8 (a)(1) of the Act (R. 53).

With respect to Petitioner's conduct up until October 7, 1948, the Trial Examiner made an affirmative finding that Petitioner did not engage in any acts which constituted interference, restraint or coercion or indeed, was even concerned about the outcome of the election (R. 34). However, the Trial Examiner found that "sometime between October 7 and October 12", Petitioner's attitude of impartiality and unconcern underwent a reversal, and that "notwithstanding its initial *bona fides* respondent could no longer be heard to say it entertained an honest doubt as to the union's representative status * * *" (R. 55). He thereupon concluded that the acts of Petitioner on October 12, 18 and 19, 1948, which he found to be violations of Section 8(a)(1) of the Act also constituted a refusal to bargain collectively with the Union in violation of Section 8(a)(5) of the Act (R. 55). The Board reversed the Trial Examiner's findings as to Petitioner's initial *bona fides* and held that there was an unlawful refusal to bargain on September 24, 1948, during the course of Jacobs' first telephone conversation with Gilbert (R. 12).

The facts upon which the Board found that the inquiries on a questionnaire submitted to employees by counsel in

preparing Petitioner's defense to the alleged unfair labor practices violated Section 8(a)(1) of the Act were stipulated as follows (R. 164-166):

> Counsel for the Petitioner, on or about March 10 and 11, 1949, submitted a questionnaire to a substantial number of Petitioner's employees employed during the months of September and October, 1948. Counsel prepared the questionnaire in the course of preparation and investigation of the facts alleged in the complaint. Before preparing the questionnaire, Petitioner's counsel called the Board's Regional Director in Atlanta by telephone and informally requested the Chief Law Officer of the Region for a more definite statement of the facts in order to prepare Petitioner's defense in the hearing. This request was refused whereupon Petitioner's counsel filed a motion for a more definite statement on the same basis and also filed its answer. The motion was referred to the Trial Examiner and was granted in part but the requested information was not furnished Petitioner under the Trial Examiner's order until the morning of March 22, 1949, at the start of the hearing.
>
> The questionnaire was submitted to and answered by the employees of the Petitioner under the following circumstances.
>
> They were interviewed in the canteen in groups of from four to eight employees on company time. Counsel introduced themselves by name to the employees and advised them that they represented the company as attorneys. They told the employees that the purpose of the questionnaire which was to be given them was to enable counsel to prepare the company's defense in the hearing that was to take place on March 22. The employees were advised that the filling out of the questionnaire was completely voluntary and that there would be no reward, no promises, threats or coercion of any kind connected with the filling out of the questionnaire. They were advised that they were free to leave the canteen at that point even before the

questionnaires were handed to them. They were advised that they could omit the answer to any question if they didn't understand it thoroughly.

They were requested to ask counsel concerning the meaning of any words, phrases, or statements which were contained in the questionnaire that they did not understand. They were requested to answer each question truthfully if they answered it and to state the facts whether they thought them unfavorable to the company or not. They were requested not to compare answers to the questionnaire among themselves, to give independent answers in accordance with the facts as each understood them to be. They were requested not to answer questions by conjecture and to state only facts of which they were certain.

They were advised that they had a right to engage in union activities prior to the election, and for that matter at the present or any time in the future. They were also told that the company had no right to interfere with their union activities in any manner.

At that point the employees were asked whether all the foregoing statements were clear to each of them and whether any of them had any questions to ask concerning their rights in connection with the filling out of the questionnaire. Counsel then read each question aloud and asked each employee if the question was clear to him. Thereupon, each employee filled out his questionnaire independently and without assistance of counsel.

* * * * * *

Specification of Errors to Be Urged

The court below erred:

1. In failing to apply the standard of review required by the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947.

2. In holding that the Board's order was supported by substantial evidence on the record considered as a whole.

3. In holding that all inquiries submitted to employees by counsel in preparation of Petitioner's defense to allegation of unfair labor practices were coercive, *per se.*

4. In holding that certain inquiries submitted to employees by counsel in preparation of Petitioner's defense to allegations of unfair labor practices violated Section 8(a)(1) of the Act merely because the answers were not of sufficient probative value.

Reasons for Granting the Writ

I. *The Board's Order Is Not Supported By Substantial Evidence On The Record Considered As A Whole.*

In deciding that the Board's order was supported by substantial evidence on the record considered as a whole, the court below indicated that it applied the same standard of review which existed prior to 1947 when the Act was amended.[1] It stated that it was not permitted "to weigh evidence or to substitute its judgment for the Board's as to what conclusions are to be drawn from the evidence."

Petitioner submits that if the court below had assumed its full measure of responsibility in reviewing the Board's decision, as required by the present amended Act, it would have reversed that decision which was based upon tenuous inferences and presumptions.

Since the identical question involving the scope of judicial review has been presented in *Universal Camera Corporation* v. *National Labor Relations Board,* No. 40, and *National Labor Relations Board* v. *Pittsburgh Steamship Company,* No. 42, presently pending in this Court, it is apparent that this Court's decision in those cases will govern this issue in the instant case.

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[1] 29 U.S.C. Sections 160(c) and 160(e).

II. *Counsel's Prehearing Inquiries Submitted To Employees In Preparing Petitioner's Defense To Allegations Of Unfair Labor Practices Did Not Violate Section 8(a)(1) Of The Act.*

The decision of the court below, that the prehearing inquiries of Petitioner's counsel violated Section 8(a)(1) of the Act presents a novel issue of law which involves the administrative and judicial application of an important federal statute. In the course of preparing Petitioner's defense to the Board's complaint, counsel for Petitioner submitted a questionnaire to the employees under circumstances described above in this brief, *supra*, p. 7. The court below affirmed the Board's decision that twenty of the questions on the questionnaire (R. 58) did not violate Section 8(a)(1) of the Act because the information elicited was of sufficient probative value. However, it held that submission of the following eight inquiries on the questionnaire violated Section 8(a)(1) of the Act (R. 15):

> 7. What did you consider to be the purpose of signing the card?
>
> 8. Did you consider yourself a member of the Union when you signed the card?
>
> 9. At the time you signed the card, did you pay any money for membership or other fees in the Union?
>
> 10. Did you agree to the future payment of any membership, initiation or other fees to the Union?
>
> 13. Did you terminate your connection with the Union at any time after you signed a card?
>
> 14. If so, for what reason did you terminate your connection with the Union?
>
> 21. Did you cast your vote at the election solely according to your own personal views concerning whether you desired the Union to represent you and without any fear or threats as to your job and future with the Company, and without being influenced in any respect by promise of future benefits by the Company?

25. Did you consider that these speeches or the statements and notices posted on the bulletin board were threats or promises of benefits to influence your vote against the Union?

A. *Inquiries By Counsel Submitted To Employees Which Are Not In Fact Coercive Are Not Violations Of Section 8(a)(1) Of The Act.*

The court's basic premise that all inquiries by Petitioner's counsel are *per se* coercive is without basis in law or fact. The Board made no effort to prove, nor is there any evidence to support the court's conclusion that the eight inquiries were in fact coercive. Indeed, it is clear that the court's conclusion is based solely upon the Board's expertise as reflected in Board decisions cited in the opinion of the court below (R. 177). Such reliance upon the Board's expert knowledge in contradistinction to actual proof of coercion, contravenes the intent of Congress as clearly expressed in the legislative history of the Act.[2]

In *National Labor Relations Board* v. *Grower-Shipper Vegetable Association*, 122 F. 2d 368, 377 (9th Cir. 1941) the court pointed out that interference, restraint and coercion are the results of acts, *not* acts themselves. Since there is no evidence that the eight inquiries in question resulted in coercion or other interference or restraint, they do not violate the Act. In *Sax* v. *National Labor Relations Board*, 171 F. 2d 769, 772 (7th Cir. 1948),[3] the court stated that ". . . queries, standing alone as they do in this case, are insufficient to support a finding of a violation of Section 8(1). They come instead within the protection

[2] The Board may not substitute its so-called "expertness" for facts in the record in meeting the substantial evidence standard. House Conference Report No. 510, on H.R. 3020, pp. 53-55.

[3] See also *National Labor Relations Board* v. *Brown-Brockmeyer Co.*, 143 F. 2d 537, 543 (6th Cir. 1944) and *National Labor Relations Board* v. *East Texas Motor Freight Lines*, 140 F. 2d 404, 405 (5th Cir. 1944).

of free speech protected by the First Amendment to the Federal Constitution." *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479 (1941).[4] It is apparent that the court below wholly disregarded the principles established in the foregoing decisions by its assumption that all inquiries are *per se* coercive.

B. *The Decision Of The Court Below That Counsel's Prehearing Inquiries Which Did Not Elicit Information Of Sufficient Probative Value Violated Section 8(a)(1) Of The Act Imposes An Undue Burden Upon Counsel.*

In spite of the court's premise that all inquiries are *per se* coercive, it affirmed the Board's decision that twenty of the inquiries on the questionnaire (R. 178) did not violate Section 8(a)(1) of the Act, on the ground that they were both relevant to the allegations of the complaint and also of sufficient probative value. The volatile standard adopted by the court imposed an unprecedented and unwarranted burden upon counsel in preparing Petitioner's defense to the allegations of the complaint.

Counsel's obligation to prepare a case thoroughly requires extensive investigation and interviews of witnesses, not only to ascertain all material facts bearing on the issues, but also facts relating to issues of credibility, bias, and interest of both its own and opposing witnesses.[5] This is particularly true in unfair labor practice cases since background material, not part of the issues in a complaint,

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[4] See also *National Labor Relations Board* v. *Enid Cooperative Creamery Association*, 169 F. 2d 986, 988 (10th Cir. 1948); *National Labor Relations Board* v. *Caroline Mills, Inc.*, 158 F. 2d 793, 794 (5th Cir. 1946); *Edward G. Budd Manufacturing Co.* v. *National Labor Relations Board*, 142 F. 2d 922, 926 (3rd Cir. 1944).

[5] The propriety of interviewing witnesses or prospective witnesses for the opposing side under the circumstances present in this case is clearly sustained by Canon 39 of the Canons of Ethics of the American Bar Association.

has always been regarded as significant by the Board and the courts. Cf. *National Labor Relations Board* v. *Trojan Powder Company,* 135 F. 2d 337, 338 (3rd Cir. 1943). In the instant case, where the allegations of the complaint were so broad (R. 4) that it may be characterized as a "shotgun" complaint, it was impossible to determine prospectively which questions would elicit answers of high probative value. Since it is apparent that the degree of probativeness of the answer to a particular question can be ascertained only in retrospect, the standard applied by the court is so illogical that it deprived Petitioner of its right to prepare an adequate defense to the allegations of the complaint.

Conclusion

For all of the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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February 20, 1951.

(3158)

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	13
Conclusion	22
Appendix	23

CITATIONS

Cases:

Heinz Company v. *National Labor Relations Board*, 311 U. S. 514	17
May Department Stores Co., 70 NLRB 94	21
N & W Overall Co., 51 NLRB 1016	21
National Labor Relations Board v. *A. L. Abell Co.*, 97 F. 2d 951	17
National Labor Relations Board v. *Arcade-Sunshine Co.*, 73 App. D. C. 128, 118 F. 2d 49, certiorari denied, 313 U. S. 567	17
National Labor Relations Board v. *Brown Paper Mill Co., Inc.*, 133 F. 2d 988	17
National Labor Relations Board v. *LaSalle Steel Co.*, 178 F. 2d 829, certiorari denied, 339 U. S. 963	17
National Labor Relations Board v. *Minnesota Mining and Mfg. Co.*, 179 F. 2d 323	17
National Labor Relations Board v. *National Plastic Products Co.*, 175 F. 2d 755	17
National Labor Relations Board v. *Sewell Manufacturing Co.*, 172 F. 2d 459	17
National Labor Relations Board v. *Stowe Spinning Co.*, 336 U. S. 226	20
National Labor Relations Board v. *Van Deusen*, 138 F. 2d 893	17
Republic Aviation Co. v. *National Labor Relations Board*, 324 U. S. 793	19, 20
Southern Furniture Manufacturing Co., 91 NLRB, No. 189	21
Standard-Coosa-Thatcher Co., 85 NLRB 1358	17, 18
Texarkana Bus Co. v. *National Labor Relations Board*, 119 F. 2d 480	17
Universal Camera Corp. v. *National Labor Relations Board*, No. 40, this Term	14, 15, 16, 20

Statutes:

Page

Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., Supp. III, 141, *et seq.*):

Section 7 23
Section 8 (a) (1) 23
Section 8 (a) (5) 23
Section 10 (e) 23-24

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 569

JOY SILK MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 168-180) is reported at 185 F. 2d 732. The findings of fact, conclusions of law, and order (R. 9-67) of the National Labor Relations Board are reported at 85 NLRB 1263.

JURISDICTION

The decree of the court below was entered on December 15, 1950 (R. 187-190). The petition for

a writ of certiorari was filed on February 20, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether, as the court below held, the Board's findings of fact are supported by substantial evidence on the record considered as a whole.

2. Whether, in making an accommodation between the right of employees to be free from interrogation by the employer concerning their union activity, on the one hand, and the interest of the employer in obtaining evidence in preparation for an unfair labor practice hearing, on the other, the Board may properly require that the employer restrict his questioning of employees to matter which is relevant to the unfair labor practice in issue and is of sufficient probative value.

STATUTE INVOLVED

The pertinent provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are set forth in the Appendix, *infra,* pp. 23-24.

STATEMENT

Upon the usual proceedings under Section 10 of the Act, the Board, on September 13, 1949, issued its findings of fact, conclusions of law, and order (R. 9-67). In the court below, by stipulation

(R. 152-166), petitioner "admitted" the main body of the subsidiary findings "for purposes of review," (R. 152), so that, as the court explained (R. 171), petitioner's "primary challenge" was "to the ultimate conclusions of fact and law which have been reached by the trial examiner and the Board." The Board's findings of fact, as shown by the evidence and admitted by stipulation, and the Board's conclusions of law, may be summarized as follows. (The stipulated facts are designated by the symbol "St.")

In order to induce petitioner to recede from its plan to dismiss a popular foreman (St. 154), to which was later added the further objective of obtaining paid vacations (St. 154), the employees engaged in a short strike lasting from September 16 to 20, 1948 (St. 154-155). During the strike, 38 of petitioner's 52 employees signed membership cards authorizing the United Textile Workers of America, A. F. L., to bargain collectively for them (St. 154). Thereby a majority of the production and maintenance employees designated the Union as their bargaining representative (St. 156).

The signed membership cards were transmitted to Britton, state president of the A. F. L., who referred them to Jacobs, southern director of the Union, on September 19 (St. 155). Jacobs instructed Britton to communicate with petitioner in order to demand recognition and to inaugurate bargaining (R. 26; 102). Britton thereupon sent

a letter to Gilbert, petitioner's president, which stated that more than 30 percent of the employees had signed membership cards and that therefore the Union was proceeding to petition the National Labor Relations Board for an election (R. 82). When Jacobs received a copy of this letter on the 23rd, he recognized that it failed to include a clear demand to bargain "in terms required by the Board" (R. 26; 108).

The following morning, in order to perfect the demand to bargain, Jacobs personally telephoned Gilbert long distance and asked him to "recognize us as collective bargaining agent for production and maintenance employees at the plant because we had been authorized to represent them" (R. 27; 102).[1] Gilbert refused Jacobs' request for recognition, stating that in his opinion the Union's loss of an election held in 1946 settled the matter. Jacobs explained that, two years having elapsed, a new election was not precluded, and, in any event, since the Union presently represented a majority of the employees, it was within its rights to request collective bargaining now. As a means of substantiating the Union's majority status Jacobs proposed that the signed union cards be cross-

[1] Gilbert denied that Jacobs requested bargaining on this occasion (R. 122). The examiner discredited this testimony (R. 30); the Board affirmed the examiner, noting that "the importance of observation of witnesses to any finding of their credibility is such that we will not overrule the credibility findings of Trial Examiners unless they are clearly erroneous" (R. 10, n. 3); and the court below affirmed the Board (R. 174-175).

checked against petitioner's pay roll by an impartial person. Upon rejection of that method, Jacobs further suggested that a consent election be held. That too was rejected by Gilbert. He insisted that any election be conducted only after all formal Board processes had run their course. The conversation closed with Jacobs' statement that he would file an election petition with the Board (R. 27; 102, 103).

Immediately following this conversation, Jacobs filed a representation petition with the Board which stated among its allegations that the Union had "notified the employer of claim that a question concerning representation has arisen" and that "the employer failed to recognize" the Union (R. 27; Tr. 818). Gilbert was informed of this action by a long-distance call later that same day from Patterson, Field Examiner of the Board's Regional Office in Atlanta. Patterson asked whether Gilbert would agree to a consent election, but the latter preferred to consult his attorney before committing himself (R. 27; 123).

Field Examiner Patterson, in an effort to arrange a consent election, convened a meeting in the company's office on September 30, at which Manager Southerland and Henry J. Fox, attorney, represented petitioner, and Joseph Jacobs appeared for the Union (R. 28; 106, 144). Jacobs again asked for a cross-check but Fox declined the suggestion. However, tentative agreement was reached to hold a consent election, subject to the

petitioner's ascertainment that its operations were within the Board's jurisdiction. Toward the close of the conference, Jacobs declared, "Of course, we could obviate all of this if we would sit down and get a contract," to which no reply was made (R. 28; 111). On October 7, 1948 after petitioner was advised by counsel that it was subject to the Act, an agreement was entered into providing for the holding of an election on October 19 (R. 29; 106).

The Board found that beginning on October 12, within a week preceding the election, and continuing through the election, petitioner embarked upon a coercive course of conduct which "made a free election impossible" (R. 11). The Board further found that petitioner's conduct revealed that its rejection of the Union's request to bargain on September 24, and its insistence upon an election were motivated, not "by a good faith doubt of the Union's majority," but by a desire "to gain time within which to undermine the Union's support" (R. 12). Accordingly, the Board held that "a refusal [to bargain] took place on September 24, and from that time on, [petitioner] refused to bargain collectively within the meaning of Section 8 (a) (5) of the Act" (R. 11-12). In this respect the Board differed with its examiner, who was of the view that petitioner's bad faith began on October 12, the date of petitioner's first unfair labor practice, and that thereafter petitioner's "acts of interference and coercion . . . demonstrated

that whatever doubts [of the Union's majority] it had previously entertained were no longer genuine, that it no longer had reason to believe the Union's claim of a majority was untrue . . ., and that it sought to evade its obligation to recognize and bargain with the union" (R. 54).

The events upon which the Board and the examiner relied for their inferences of petitioner's bad faith are as follows:

Before the employees' organizational activity began, petitioner did not provide the employees with any rest period during which they could eat their lunch (R. 101, Tr. 88). Furthermore, although the employees had long been seeking such an arrangement, there was no system of shift rotation in the plant by which the swing and night shift employees would have an opportunity to work on the day shift at regular intervals, and its absence was responsible for employee dissatisfaction (R. 140, 141, 151).

On October 12, petitioner assembled its employees on company time to hear a lengthy anti-union speech prepared by President Gilbert and read on his behalf by K. F. (Fred) Carpenter, who was held out by petitioner "to its employees as its agent, and indeed as a part of its managerial staff" (R. 39).[2] In that speech Gilbert disparaged

[2] The subsidiary findings, on which the Board's ultimate conclusion that Carpenter was a management spokesman rests (R. 38-39), were stipulated (St. 158-159). In affirming this conclusion, the court below stated (R. 173): ". . . we think the Board clearly correct in finding petitioner responsible . . . for Carpenter's actions."

the need for a union, and for the first time he pledged that "as soon as equipment for the canteen * * * arrives, you will be given a rest period so that you may eat your lunches and relax in comfort during your shift" (R. 51; 91).

On October 18, the day before the election, Carpenter again delivered an anti-union speech prepared by Gilbert, similar in tenor to the first one (R. 93-100). This speech furnished the occasion for Gilbert's promise to remove the employees' dissatisfaction over the lack of shift rotation, for following the speech, employee Bessie Chapman asked Gilbert whether he contemplated instituting a system of shift rotation. Gilbert agreed to this action if desired by a majority of the employees (R. 115). This promise was reaffirmed by Superintendent Russell in a conversation with another employee, Vonceil Hollomon, some days later (R. 35; Tr. 501).

The Board concluded that these "promises of benefit because of their significant timing, were calculated directly to affect the decision of the employees on the issue of union representation," and were proscribed by Section 8 (a) (1) of the Act because they constituted a use of economic power "*for the purpose* of causing the employees to accept or reject a representative for collective bargaining" (R. 52).

In his capacity as plant superintendent, Russell had close and daily contact with the employees in the mill (Tr. 493). He admittedly held anti-union

views, and during the immediate preelection period he attempted to persuade employees to these views by reporting his own unsatisfactory experience as a former union member (St. 162, 163). During the course of this activity, Superintendent Russell engaged in the following conduct:

One or two days before the election, Superintendent Russell asked employee William Chapman, an oiler under his supervision, whether he had made up his mind concerning the vote he was to cast. When Chapman replied that he had, Russell "hoped that it was made up the right way." After informing Chapman that "you can't leave the union to become a foreman," Russell stated that a raise was pending for Chapman which might well be delayed or even retracted in the event of a union victory (St. 163). In similar fashion, a few days before the election, Russell interrogated employee Vonceil Hollomon concerning her attendance at a union meeting held some nights previously. Russell informed Hollomon that although voting for the Union would not endanger her job, it might well imperil her designation to the first shift (St. 163).

On October 18, the same day that President Gilbert's anti-union speech was read to the employees and only one day before the election, Russell questioned employees Henry D. O'Neal and Gwendolyn Beasley. Russell asked O'Neal about his union sympathy, and upon learning that O'Neal had attended a union meeting the day before, he

sought further information from O'Neal about the number of workers attending. O'Neal gave his estimate of the number of employees present, and Russell concluded the conversation by enjoining O'Neal to "let him know if he found out anything more." O'Neal promised he would do so. (R. 44-45; 115, 116, Tr. 242.) Russell similarly approached employee Beasley at her machine and asked her how many were present at the union meeting, what the Union promised, and whether the Union could give the employees anything he could not (St. 162, 163). Finally, the very morning of the election, Russell asked employee Jean Longrie the reason for her sudden interest in the Union (St. 162).[3]

The Board found that "the inquiries by Russell as to employees' interest in, views toward, and membership in the Union and as to how they intended to vote in the election; his inquiries as to union meetings and activities and his solicitation of employee assistance in obtaining such information; his implied threat that an employee would not receive a contemplated increase if the Union came in; his implied threat that if an employee voted for the Union, she would lose her shift; and his questioning of an applicant for employment as

[3] Russell continued with his antiunion activity even after the election. On December 21, 1948, in the course of interviewing Lois Gainey, who was an applicant for a job, he first informed her that openings existed, and then he interrogated her as to her opinion of the Union. The applicant replied that she lacked sufficient knowledge to express an opinion on this score. Shortly thereafter she was hired (St. 164).

to her union views," were coercive acts violative of Section 8 (a) (1) of the Act (R. 53, 54).

Management representative Fred Carpenter, who read President Gilbert's antiunion speeches on October 12, and 18 (*supra,* pp. 7-8), carried out their theme by engaging in coercive pressure directed against individual employees in the same fashion as did Superintendent Russell. On October 18, the day before the election and the same day as his antiunion speech, Carpenter approached employee O'Neal, as had Superintendent Russell (*supra,* pp. 9-10), and said, "you didn't tell me which way you were going to vote, for or against the union." When O'Neal failed to answer, Carpenter at first turned away, but then he returned and asked, "you like your job?" (St. 160). On the same day, Carpenter, visiting employee Edna Robbins at her machine, informed her of his surprise that she was a member of the Union, considering that her father (employed by another company in town) was not a union adherent (St. 160).

The next day, the very morning of the election, Carpenter continued this pressure, using as his frame of reference a newspaper article written by Westbrook Pegler which was unfavorable to union leadership in general (St. 159). He exhibited the clipping to various employees at their machines (St. 159, 160, 161), and requested them to read it so that they could inform themselves (as Carpenter put it) "of another angle of the union question

which possibly had not been presented" (St. 160). After Jean Longrie, the employee to whom Superintendent Russell expressed surprise because of her interest in the Union (*supra*, p. 10), had read the Pegler article, Carpenter warned her that "if the union came in, Mr. Gilbert probably would close down the mill and we would both be out of a job" (St. 160). In similar vein, while employee Robert Morris was performing his job, Carpenter interrogated Morris concerning how he intended to vote. Morris replied that this matter was his own business. Carpenter warned Morris against "going around telling people how to vote" (St. 160, 161).

The Board found that "the inquiries by Carpenter as to how employees would vote in the election and as to their union membership, views and attitudes; his threat that Gilbert probably would close the mill if the Union came in; and his implied threat to O'Neal that his job would be affected by his vote" were coercive acts violative of Section 8 (a) (1) of the Act (R. 53).

Counsel for petitioner, on March 10 and 11, 1949, submitted a questionnaire to a substantial number of employees who had worked for petitioner during September and October of 1948. The inquiry was made by petitioner's attorney in the course of his investigation of the facts alleged in the complaint and in his preparation of the case for the hearing (St. 164). The questionnaire, pertaining to the employees' union activity, contained 28 inquiries

(R. 79-81). The Board found that eight of these questions were in violation of Section 8 (a) (1) of the Act, since they elicited information outside the scope of the issues framed by the pleadings, and thus exceeded the privilege of inquiry afforded as an aid to trial preparation (R. 61).

The Board's order required petitioner to cease and desist from refusing to bargain collectively with the Union,[4] and to refrain from in any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act (R. 13). Affirmatively, the Board's order required petitioner to bargain with the Union upon request and to post appropriate notices (R. 13).

The court below, Judge Miller dissenting, affirmed the Board's findings of fact and conclusions of law in full, and, Judge Washington dissenting, narrowed the scope of the Board's order to an injunction against the specific unfair labor practices found (R. 180 and n. 13).

ARGUMENT

1. In reviewing the substantiality of the evidence to support the Board's findings of fact, the court below stated that "the test now is whether there is 'substantial evidence on the record considered as a whole,' and it is that test which we shall apply to

[4] This remedy was clearly appropriate in view of the admitted fact (St. 156) that the Union had been designated by a majority of the employees as their bargaining agent before petitioner committed unfair labor practices to dissipate that majority.

the best of our ability and understanding" (R. 172). It is plain on the face of the court's thirteen-page opinion, which includes explicit citation to the record (R. 172-176), that the court subjected the record as a whole to careful scrutiny. There is, therefore, no occasion for this Court's further review, with respect to "a question which Congress has placed in the keeping of the Courts of Appeals," for it is clear that the standard of review has not "been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *National Labor Relations Board,* No. 40, this Term, sl. op., p. 16. Nor is it material whether the court below believed that the standard of the review had been altered or not, because the court committed itself to neither view (R. 175-176). So long as "it is clear from the court's opinion in this case," as it is, "that it in fact did consider the 'record as a whole,' and did not deem itself merely the judicial echo of the Board's conclusion," *id.,* at pp. 16-17, exercise of this Court's supervisory authority is not warranted.

Petitioner relies (Pet. p. 9), as its sole basis for imputing error to the court below, upon the statement of that court that "The amendment [to the standard of review], like its predecessor, does not permit the court to weigh evidence or substitute its judgment for the Board's as to what conclusions are to be drawn from the evidence" (R. 171). The statement accurately anticipated this Court's opinion that the altered standard does not "mean that even as to matters not requiring expertise a court

may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp.* v. *National Labor Relations Board, supra,* at p. 13. The function of reviewing courts is to assure that "the Board keeps within reasonable grounds," and in the discharge of that function, the "Board's findings are entitled to respect." *Id.,* at p. 15. The court below in this case fulfilled that duty; and since petitioner in the court below stipulated its concurrence with most of the Board's subsidiary findings of fact (*supra,* pp. 2-3), there can be no serious quarrel with the general "reasonableness and fairness" of the Board's decision.

Finally, as to the difference between the Board and the examiner on a single issue of fact (*supra,* pp. 6-7), the court below stated that "Petitioner is correct in contending that where there has been a contrariety of opinion between the Board and the trial examiner (here both found a refusal to bargain, but differed as to when it occurred), the evidence must be examined with greater care than when both the Board and the trial examiner are in complete agreement" (R. 176). It is clear, therefore, that the court below did take into account the examiner's report when it held "that there was 'substantial' evidence, viewing the entire record, from which the Board could conclude that the original refusal of recognition was in bad faith" (R. 175). Moreover, since the Board's conclusion rested

upon an inference from subsidiary facts upon which there was no disagreement between the Board and the examiner, the fact in issue did not involve a "credibility" question upon which the "significance" of the examiner's report "depends largely." *Universal Camera Corp.* v. *National Labor Relations Board, supra,* at p. 21.

2. Petitioner does not contest the Board's conclusion (R. 55-61), affirmed by the court below (R. 177-178), that eight of the 28 questions it asked employees in preparation for the unfair labor practice hearing were not relevant to the issues framed by the pleadings and were without adequate probative value.[5] Its position is, therefore, that preparation for hearing accords it an unlimited privilege of inquiry into the union activity of employees. It is the Board's view, however, that in achieving a reasonable accommodation between the right of employees to be free from interrogation by the employer concerning their union activity, on the one hand, and the interest of the employer in obtaining evidence in preparation for an unfair labor practice hearing, on the other, the Board may properly require that the employer

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[5] The following are some of the questions which the Board and the court below found to be irrelevant (R. 58-61, 176-178):

7. What did you consider to be the purpose of signing the card?

8. Did you consider yourself a member of the Union when you signed the card?

25. Did you consider that these speeches or the statements and notices posted on the bulletin board were threats or promises of benefit to influence your vote against the Union?

restrict his questioning of employees to matters which are relevant to the unfair labor practices in issue and are of sufficient probative value.

The right of employees to be free from "questioning . . . concerning their labor sympathies" (*Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514, 518) is basic.[6] As recently restated by the Board, "Inherent in the very nature of the rights protected by Section 7 is the concomitant right of privacy in their enjoyment," and interrogation is incompatible with this " 'full freedom' from employer intermeddling, intrusion, or even knowledge." *Standard-Coosa-Thatcher Co.,* 85 NLRB 1358, 1360. "The employee who is interrogated concerning matters which are his sole concern is reasonably led to believe that his employer not only wants information on the nature and extent of his union interests and activities but also contemplates some form of reprisal once the information is obtained." 85 NLRB, at 1361. "Our experience," the Board continued, "demonstrates

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[6] See, *e.g., National Labor Relations Board* v. *Minnesota Mining and Mfg. Co.,* 179 F. 2d 323, 326 (C. A. 8); *National Labor Relations Board* v. *LaSalle Steel Co.,* 178 F. 2d 829, 835 (C. A. 7); certiorari denied, 339 U. S. 963; *National Labor Relations Board* v. *National Plastic Products Co.,* 175 F. 2d 755, 760 (C. A. 4); *National Labor Relations Board* v. *Sewell Mfg. Co.,* 172 F. 2d 459, 460-461 (C. A. 5); *National Labor Relations Board* v. *Arcade-Sunshine Co.,* 73 App. D. C. 128, 118 F. 2d 49, 50, certiorari denied, 313 U. S. 567; *Texarkana Bus Co.* v. *National Labor Relations Board,* 119 F. 2d 480, 483 (C. A. 8); *National Labor Relations Board* v. *Brown Paper Mill Co., Inc.,* 133 F. 2d 988, 989 (C. A. 5); *National Labor Relations Board* v. *A. L. Abell Co.,* 97 F. 2d 951, 955 (C. A. 4); *National Labor Relations Board* v. *Van Deusen,* 138 F. 2d 893, 895 (C. A. 2).

that the fear of subsequent discrimination which interrogation instills in the minds of employees is reasonable and well-founded. The cases in which interrogated employees have been discharged or otherwise discriminated against on the basis of information obtained through interrogation are numerous. These cases demonstrate conclusively that, by and large, employers who engage in this practice are not motivated by idle curiosity, but rather by a desire to rid themselves of union adherents." 85 NLRB, at 1362. Accordingly, the prohibition of interrogation preserves "the employees' right to privacy in their union affairs;" removes "a subtle but effective psychological restraint on employees' concerted activities"; and prevents "the commission of the further unfair labor practice of discrimination by condemning one of the first steps leading to such discrimination." *Ibid.*

The apprehension of an employee concerning the consequences of interrogation is not dispelled merely because the questioning takes place in the course of an employer's preparation for hearing. To the employee, particularly of an employer who has already demonstrated his strong union antipathy by coercive measures (*supra,* pp. 7-12), inquiry as to union activity may carry with it inevitable intimations of employer reprisal, which disclaimer is ineffective to dissipate even where the inquiry is made by a representative of the employer in his capacity as counsel. Nevertheless,

the Board recognizes a privilege of inquiry where the interview of employees is for the purpose of readying the employer's case for trial. The Board restricts the privilege to questions relevant to the issues framed by the pleadings and likely to elicit evidence of adequate probative value. The Board thereby strikes a fair balance between the need for protecting employees from employer intrusion on their union affairs and the need for according to the employer reasonable latitude in prehearing preparation. Cf. *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 797-798. Thus, the restrictions placed upon the information allowably elicited by a litigant is grounded on a policy which seeks to accord counsel leeway in trial preparation, but which at the same time minimizes the risk of the attainment of an otherwise outlawed objective.

In approving "the standard established by the Board," and its application in this case, the court below stated it to be "a reasonable one, and aptly designed to carry out the purpose of the Act" (R. 177). Petitioner contends that the Board's standard and the court's approval of it erroneously rely on "expert knowledge in contradistinction to actual proof of coercion. . . ." (Pet. p. 11.) Petitioner fails to distinguish between "evidential facts" and "evidence as to the results which may flow from such facts." *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 800. The record here contained the "evidential

facts"—eight questions about the employees' union activity which went beyond the issues of the pending unfair labor practice proceeding. That these questions could result in coercion of employees did not have to be proved, for the Board "may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven," and the inference drawn is entitled to weight because "made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Ibid.* See also, *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226, 231. The amendment of the standard of review does not "negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp.* v. *National Labor Relations Board, supra,* at p. 13.

Petitioner also contends that the standard places "an unprecedented and unwarranted burden upon counsel in preparing petitioner's defense to the allegations of the complaint." (Pet., p. 12.) It is difficult to accept the suggestion that questions of relevancy and probative value of evidence are beyond the capacity of counsel to cope with. Actual experience with the administration of the standard has disclosed no hardship. Since its inception in

1943 (*N. & W. Overall Co.*, 51 NLRB 1016, 1022), only four cases have arisen involving it, including the present case, and in all the cases except this one, the employer was exonerated from the charge of exceeding his privilege of inquiry.[7] A standard giving rise to practically no litigation can hardly be censured as unworkable. And the consequence of rejecting the standard is to give the employer an unlimited license to probe the union activity of his employees.

The standard adopted by the Board is a reasonable reconciliation between conflicting interests; there is no conflict of authority; and the paucity of litigation concerning it shows the insubstantiality of the issue. Accordingly, no further review is warranted.

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[7] *N. & W. Overall Co.*, 51 NLRB 1016, 1022; *May Department Stores Co.*, 70 NLRB 94, 95-96; *Southern Furniture Mfg. Co.*, 91 NLRB, No. 189.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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APRIL, 1951.

APPENDIX

The relevant provisions of the Labor Management Relations Act, 1947, (61 Stat. 136, 29 U. S. C., Supp. III, 141, et seq.), are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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